UNITED STATES DISTRICT COURT

FOR THE STATE OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff, NO. CR 81-8 PHX EHC

vs. JUDGEMENT AND PROBATION/COMMITMENT ORDER

DOMINICK DEBENEDICTIS,

Defendant.

In the presence of the attorney for the government the Defendant appeared in person on the 20th day of July, 1981. There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of False Statement in Application for a Passport in violation of Title 18 United States Code, Section 1542 as charged in Count 1 of the Superseding Indictment.

The Court asked whether defendant had anything to say why judgement should not be pronounced. Because no sufficient

cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. On condition that Defendant spend six months in a jail type facility, execution of the remainder of the sentence is suspended and Defendant placed on three (3) years supervised probation.

It is Further Ordered that Defendant pay a fine of $1,000.00. Such fine is to be paid during his probationary period.

ORDER that the is to surrender to the institution designated by the Bureau of Prisons on the date and time set by said agency. Pending self surrender, the Defendant will remain subject to his

present release conditions.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgement be imposed. The Court may change conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that he Clerk deliver a certified copy of this judgement and commitment to the U.S. Marshal or other qualified officer.

S/ Earl H. Carroll
Earl H. Carroll
U.S. District Judge

Dated: July 20, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, NO. 81-1477

Plaintiff-Appellee, DC No. 81-008PHX

vs. MEMORANDUM

DOMINICK PHILLIP DEBENEDICTIS,

Defendant-Appellant

Appeal from the United States District Court for the District of Arizona

Earl H. Carroll, District Judge, Presiding

Submitted February 5, 1982

Before: SKOPIL and SCHROEDER, Circuit Judges; and AGUILAR,[1] District Judge

DeBenedictis appeals his conviction of making a false statement in an application for a passport in violation of 18 U.S.C. S 1542. We affirm.

DeBenedictis contends that the

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[1] The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

district court failed to hold a hearing on whether certain statements made by DeBenedictis were voluntary, as required by Jackson v. Denno, 378 U.S. 368, 376-77, 380 (1964). The hearing must be out of the presence of the convicting jury. Id. at 391 & n.19. In federal court the determination of voluntariness must be made by the court. Compare Fed.R.Evid. 104(c) and United States v. James, 590 F.2d 575, 579 & n.3 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) with Jackson V. Denno, 378 U.S. at 392 n.19.

In this case the district court held a voluntariness hearing. DeBenedictis contends that the district court did not permit him to put on evidence. The district court heard all of the evidence that was presented. DeBenedictis did not state that he wanted to put on evidence. He did not object to the district court's

failure to ask him whether he wanted to put on evidence. He therefore waived any objection to the procedure followed by the district court. Winston v. United States, 342 F.2d 715, 724 (9th Cir. 1965); Pacific Coast Cheese V. Wirtz, 314 F.2d 145, 148-49 (9th Cir. 1963). The district court's determination of voluntariness is clearly "ascertainable from the record." United States v. Read, 411 F.2d 582, 583 (9th Cir. 1969). See Nelson v. McCarthy, 637 F.2d 1291, 1294 (9th Cir. 1980_, cert. denied, 451 U.S. 940 (1981). Compare United States v. Brown, 575 F.2d 746, 748 (9th Cir. 1978). DeBenedictis does not argue that the trial court's determination was clearly erroneous.

DeBenedictis moved for a judgement of acquittal after the government rested. The district court took the motion under advisement, permitted the government to

reopen its case, and subsequently denied the motion. DeBenedictis contends that the district court erred in so doing.

It is error for a district court to fail to rule on a motion for judgement of acquittal, made at the close of the government's evidence, before a defendant is required to proceed with his evidence. United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969); Fed.R.Crim.P. 29. In this case the district court merely postponed deciding the motion for judgement of acquittal while the government reopened its case. The defendant was not yet required to proceed. In general the district court has discretion to permit the government to reopen. E.g., United

States v. Sisack, 527 F.2d 917, 919-20 (9th Cir. 1975); United States v. Powers, 572 F.2d 146, 152-53 & n.6 (8th Cir. 1978). The district court did not abuse its discretion here. The district court even has discretion to permit reopening and defer ruling on a motion for judgement of acquittal where the purpose of re-opening is to prove venue. Morgan v. United States, 380 F.2d 686, 703 (9th Cir. 1967), cert. denied, 390 U.S. 962 (1969); United States v. McDonough, 603 F.2d 19, 22 (7th Cir. 1979). We hold that a district court may also reserve ruling on a motion for judgement of acquittal while it permits the government to reopen to identify the defendant in court. See United States v. Powers, 572 F.2d at 152-153 (permitting deferral of motion for judgement of acquittal pending reopening to test-fire firearms); United States v.

Dossey, 558 F.2d 1336, 1339 (8th Cir. 1977) (permitting deferral pending reopening to admit testimony of other crimes). Introduction of the new evidence rendered DeBenedictis' motion for judgement of acquittal premature. United States v. Dossey, 558 F.2d at 1339. DeBenedictis did not renew his motion after the government again rested. DeBenedictis did not seek to put on his own case, nor did he object to the district court's failure to ask him whether he intended to put on evidence. He has therefore waived any objection on this point. E.g., Winston v. United States, 342 F.2d at 724.

Accordingly, the judgement appealed from is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee No. 81-1477

vs. DC CR 81-8 EHC

DOMINICK PHILLIP DEBENEDICITIS,

Defendant-Appellant.

APPEAL from the United States District Court for the District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this Cause be, and hereby is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 81-1477
Plaintiff-Appellee,	DC No.81-008PHX
vs.	ORDER
DOMINICK PHILLIP DEBENEDICTIS,	
Defendant-Appellant.	

Appeal from the United States District Court for the District of Arizona
Earl H. Carroll,
District Judge, Residing

Before: SKOPIL and SCHROEDER, Circuit Judges; and AGUILAR[1], District Judge

The memorandum disposition of the above-named case, filed March 17, 1982, is ordered amended. The sentence which begins at page 2, line 26 is ordered deleted. In its place is substituted; "The district court did not rule im-

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[1] The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

mediately on DeBenedictis' motion for judgement of acquittal. The district court's action merely had the effect of postponing a ruling on the motion until after the government had reopened its case."

The panel has also voted to deny the petition for rehearing. The petition for rehearing is denied.